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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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Respondents offer no persuasive reason why federal prisoners should be forced to exhaust the three-tier Bureau of Prisons (BOP) grievance process before filing *Bivens* suits that seek only compensation for past constitutional deprivations. Their suggestion that this process may lead indirectly to a monetary award is plainly incorrect. Moreover, they fare no better in their attempts to muster legal authorities and policy arguments supporting mandatory exhaustion despite the absence of a relevant remedy.

I. THE BOP GRIEVANCE PROCEDURE OFFERS NO REMEDY.

The basic flaw in respondents' argument is their inability to show that the grievance process provides any "remedy" to potential plaintiffs seeking only damages for

constitutional violations under *Bivens*. This flaw, in turn, fatally undermines their contention that requiring exhaustion will serve the public interest by resolving some disputes before they get to court in the first place.

Respondents, having previously acknowledged that "prison officials . . . are not authorized to award money damages" in the grievance process, Br. in Opp. at 7 n.4, now attempt to show otherwise.[1] They point to the regulations authorizing settlement of Federal Tort Claims Act (FTCA) claims at the administrative level and suggest that this authority may be used to provide compensation to potential *Bivens* plaintiffs. Resp. Br. at 19-20 (citing 28 C.F.R. §§ 543.30, .31). But this effort to impart some significance to the grievance process in pure damages cases is unavailing.

It is true the BOP has authority to settle FTCA claims at the administrative stage, for amounts up to $2500. 28 C.F.R. § 543.31(e), (f). It is also possible that some potential *Bivens* plaintiffs may be satisfied with relief of this magnitude and will accept FTCA administrative settlements, thus precluding subsequent *Bivens* actions.[2] In many cases, however, this cannot occur because the FTCA does not apply to constitutional claims that have no state-law analogue.[3] More fundamentally, even in cases where an FTCA settlement would be possible, there

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[1] *See also* Brief for the United States in Opposition at 4 n.3, *Brice v. Day*, 444 U.S. 1086 (1980) (No. 79-5739) (where a prisoner seeks only damages, there "appears to be little justification for compelling him to resort to an administrative remedy that is neither designed to adjudicate constitutional damages claims *nor empowered to award damages relief*") (emphasis added).

[2] *See* 28 U.S.C. § 2672 (acceptance of an FTCA administrative settlement "shall constitute a complete release of any claim . . . against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter").

[3] 28 U.S.C. § 2674; *see McAfee v. 5th Circuit Judges*, 884 F.2d 221, 223 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1141 (1990); *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).

is no reason to believe that it would promote such an outcome to require exhaustion of the BOP grievance procedure.

This is true because administrative settlements under the FTCA almost certainly occur only when prisoners have filed claims under the entirely separate FTCA administrative procedure.[4] Respondents do not say otherwise.[5] As a legal matter, the BOP regulations plainly contemplate settlement of FTCA claims *after* they have been filed, administratively, under the FTCA.[6] In any event, as a practical matter, it is implausible to suggest that the BOP sorts through a multitude of grievance filings, identifies those that might form the basis of valid FTCA claims, and *sua sponte* offers monetary settlements to grievants before they have even sought such compensation by filing an FTCA administrative claim.

If this does not occur, then it is utterly illogical to suggest that requiring exhaustion of the informal grievance procedure by potential *Bivens* plaintiffs would promote the administrative resolution of these cases under the aegis of the FTCA. Such potential plaintiffs could only receive compensation at the administrative level—

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[4] The BOP regulations contain two separate administrative complaint procedures—the grievance process at issue here, 28 C.F.R. Part 542, and a separate FTCA administrative procedure, 28 C.F.R. §§ 543.30-.32. The former covers grievances other than "tort claims" under the FTCA. *See* Resp. Br. at 3 n.1. The latter covers only FTCA claims. The informal procedure must be invoked within a matter of days. The FTCA procedure may be invoked up to two years after an alleged tort. 28 U.S.C. § 2401(b).

[5] They say only that the BOP has entered into FTCA administrative settlements before grievances have been brought to *court*, Resp. Br. at 20.

[6] The regulations provide that the BOP "shall consider administrative claims *asserted under the Federal Tort Claims Act*." 28 C.F.R. § 543.30 (emphasis added). Moreover, the process for assessing the merits of an FTCA claim begins with the submission of the prescribed FTCA claim form to the BOP Regional Office. *Id.* § 543.31.

thereby forestalling a later *Bivens* action—if they chose to file a claim under the FTCA before proceeding to court under *Bivens*. Their decision to do so, in turn, would not in any way be affected by a requirement that they exhaust an entirely separate grievance procedure where compensation is not available.

Moreover, even assuming that a filing in the informal grievance process might, by itself, produce an FTCA administrative settlement in some peculiar circumstance, this possibility still would not provide a justification for requiring all *Bivens* plaintiffs to pass through the grievance process before going to court. Since the grievance process creates no *entitlement* to a compensatory remedy, the mere possibility that the BOP may on its own initiative offer an FTCA settlement in response to an informal grievance hardly justifies mandatory exhaustion.[7] This is especially true since any potential *Bivens* plaintiff who is inclined to accept an FTCA settlement would, even absent any *Bivens* exhaustion requirement, be likely to file an FTCA claim first.

Finally, it would be wrong, in principle, to condition the filing of a *Bivens* lawsuit on completion of an administrative process where the theory is that this may lead to an FTCA settlement. *Bivens* and the FTCA provide separate remedies—against different defendants, with different forms of relief available, and serving distinct purposes. *Carlson v. Green*, 446 U.S. 14, 20-23 (1980). Congress has expressly recognized the independent importance of *Bivens* claims by providing that they, unlike common-law claims against federal employees, are not preempted by the availability of an FTCA remedy. 28 U.S.C. § 2679(b)(2)(A). A plaintiff cannot, however,

[7] It would be particularly bizarre, based on this mere possibility, to require inmates to complete three levels of the grievance process. After all, even when prisoners are directly requesting relief under the FTCA, they are only required to file a single form at the administrative level, and then wait six months, before proceeding to court. 28 C.F.R. § 543.31.

obtain relief both under *Bivens* and under the FTCA for the same injury. *See id.* § 2672 (administrative settlement under FTCA precludes claims against employee); *id.* § 2676 (judgment in FTCA action bars suit against employee involving same subject matter).[8]

Thus, a potential plaintiff has a right to decide whether to proceed under *Bivens* or under the FTCA in a case potentially covered by both remedies. *Carlson v. Green*, *supra*. Here, however, respondents are arguing that an inmate who wants to pursue a *Bivens* claim should be forced first into an administrative process based on the speculative possibility that he may be offered an FTCA settlement. In view of the clear congressional decision to allow plaintiffs a choice between the *Bivens* and FTCA remedies, the effort to link those two remedies as a basis for mandatory exhaustion is unjustifiable.

Respondents also refer in passing to another regulation authorizing the Department of Justice to settle civil damages suits brought against its empolyees. Resp. Br. at 20 n.10 (citing 28 C.F.R. § 50.15(c)(2)). They suggest that this authority could be used, during the informal grievance process, to provide compensation to potential *Bivens* plaintiffs whose claims fall outside the scope of the FTCA. However, we are not told that this has ever been done. Nor is there any reason to think that this possibility is anything more than fanciful.

This second regulation, in all likelihood, does not even come into play until after an employee has been sued and the Government has decided to offer him representation in court.[9] In any event, it specifically provides that

[8] *See Arevalo v. Woods*, 811 F.2d 487, 489-90 (9th Cir. 1987) (applying 28 U.S.C. § 2676 to a *Bivens* claim).

[9] The section cited by respondents is part of a broader regulation authorizing representation by the Government of an individual Department employee "in civil, criminal and Congressional proceedings in which he is sued, subpoenaed or charged in his individual ca-

"[a]bsent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request . . . to settle a personal damages claim *before entry of an adverse verdict, judgment or award.*" 28 C.F.R. 50.15(c)(3) (emphasis added).[10] Obviously, no such verdict or judgment can occur if a potential claim is still pending only in the grievance process.

In sum, respondents simply have not shown that requiring exhaustion of the grievance procedure can lead to an award of compensation at the administrative level and thus forestall a *Bivens* suit. *See Figueroa v. Quinlan*, 1991 U.S. App. Lexis 14141 (4th Cir. July 2, 1991) ("Administrative exhaustion should not be required in *Bivens* actions seeking only monetary relief because the available administrative remedy is inadequate.") It follows that they are also wrong in arguing that mandatory exhaustion will

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pacity." 28 C.F.R. § 50.15(a). Before receiving such representation, the employee must make a written request, *id.* § 50.15(a)(1), and there must be a departmental review to ascertain whether the employee was acting within the scope of his employment and whether providing representation would be in the interest of the United States, *id.* § 50.15(a)(2). The cited section then authorizes *the Department* to "settle or compromise a personal damages claim" against a department employee where the same criteria are met. *Id.* § 50.15(c)(2). Thus, the section seems to contemplate that settlements will occur when an employee is being represented by the Department, which, in turn, only occurs after a lawsuit has been filed.

[10] The Department's explanation of this policy was even clearer:

> The policy also allows the Department in rare cases to settle an individual capacity claim by the payment of Department funds . . . . Absent exceptional circumstances, the Department will not agree either to indemnify or settle before entry of an adverse judgment. The change in policy is thus designed to discourage the filing of lawsuits against federal employees in their individual capacity solely in order to pressure the government into settlement. In the usual case, the denial of dispositive motions or the delay in deciding them will not lead to settlement before trial and judgment.

51 Fed. Reg. 27021, 27022 (1986).

significantly reduce the number of *Bivens* filings by federal prisoners and thereby ease the burdens faced by prison officials and the courts.[11] If the Government wants to divert potential *Bivens* claims from federal court, it can create a suitable administrative alternative that offers meaningful relief. It simply has not done so.

II. THERE IS NO BASIS IN LAW OR POLICY FOR REQUIRING EXHAUSTION OF A FUTILE PROCEDURE.

Respondents have also failed to demonstrate that exhaustion should be required even despite the fact that the grievance process offers no prospect for compensatory relief. The authorities they cite do not stand for the remarkable proposition that the doctrine of "exhaustion of administrative remedies" can apply where an administrative procedure does not offer any "remedy." Moreover, the other policies that supposedly would be served here by such a requirement do not withstand scrutiny.

1. Respondents cite several statutes and decisions of this Court that purportedly support mandatory exhaustion of an administrative procedure even where it does not offer any relevant remedy. They first compare this case to the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, which authorizes citizen suits to enforce the statute but requires sixty days' advance notice to the EPA, the relevant state, and the prospective defendant. They argue that notice is required even though it does not "provide

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[11] To the extent that such a rule did reduce *Bivens* filings, this phenomenon would reflect, not the award of suitable compensation at the administrative level, but the inherent risk of inadvertent forfeiture of claims created by a three-level grievance procedure, with specified filing deadlines, that must be initiated almost immediately after a constitutional tort has occurred. *See* Pet. Br. at 14-15. *See also id.* at 19-20 (arguing that prospective plaintiffs who seek only damages are unlikely to be deterred from filing either by some form of prospective change won in the grievance process or by the persuasiveness of the response they receive in that process).

full relief to the litigant." Br. at 32. The purpose of this notice, however, is (1) to allow the government to take enforcement action, "thus obviating the need for citizen suits," and (2) to give "the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 310 (1989) (quoting *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987)). Thus, far from being an empty gesture, the notice requirement serves to make possible precisely the outcome sought by the prospective plaintiff—*i.e.*, statutory compliance.[12]

For much the same reasons, respondents' analogy to Title VII is also misplaced. *See* Resp. Br. at 32-33. Individuals who would file suit under that statute must first proceed in the EEOC, in order to allow the commission the opportunity to work out voluntary compliance or to file suit itself. In so doing, it can hardly be said that they are invoking an administrative process that offers no suitable alternative "remedy."

The decisions of this Court cited by respondents are equally inapposite. First, in *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), see Resp. Br. at 33, the Court held that government contractors whose contracts were being renegotiated under the Renegotiation Act, 50 U.S.C. app. § 1211 *et seq.* (1976) (repealed 1978), could not use a request for internal government documents under the Freedom of Information Act (FOIA) as a basis for enjoining this administrative process in midstream. It reasoned that use of FOIA in this way would be fundamentally inconsistent with the ad-

[12] Here, by contrast, there is no suggestion that pursuit of the grievance procedure could lead anyone else to pursue the compensatory relief sought by the prospective plaintiff. Nor is there realistic possibility that such pursuit will motivate the individual alleged wrongdoers to pay such compensation even before they have been sued.

ministrative scheme, which began with a stage of "pure bargaining" between the contractor and the Government—where the contractor was not entitled to see all the "cards" in the Government's hand—followed by a *de novo* court review where full discovery was available. *Id.* at 20-26. Thus, the Court did not, as respondents now suggest, require exhaustion of a meaningless procedure; it simply barred premature interference with a prescribed administrative process that provided full protection of the interests of contractors at the appropriate stage.[13]

In *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973), *see* Resp. Br. at 33-34, a commodities trader claimed that he had been denied a membership in the Chicago Mercantile Exchange in violation of the Commodity Exchange Act and the Sherman Act. The Court held that his antitrust suit should be stayed until the Commodity Exchange Commission had an opportunity to consider the legality of the disputed events under the Commodity Exchange Act. 409 U.S. at 302. It stated that there was a serious question whether that Act preempts the antitrust laws in this context, that the Commission had statutory jurisdiction to apply the Act to this dispute, and that its determination would either pretermit the antitrust immunity issue (if the plaintiff prevailed administratively) or, at minimum, greatly assist the antitrust court in deciding that issue.

In this instance, it is true that the preliminary administrative procedure mandated by the Court could not provide

[13] Respondents argue that requiring exhaustion here would allow the "administrative processes an opportunity to work effectively." Br. at 36. However, it is simply not true that allowing *Bivens* claimants to go directly to court will interfere with the appropriate functioning of the grievance process. That process is geared solely to the prospective resolution of ongoing problems. Where an inmate seeks only compensation for past injury, there is thus nothing to be decided administratively. By contrast, petitioner does not argue that the grievance process may be bypassed prior to a court filing seeking prospective equitable relief.

all of the relief sought by the plaintiff under the antitrust laws. But *Ricci* was a special case where the scope of the antitrust laws depended on a careful analysis of the nature and scope of another statutory scheme, administered by a specialized administrative agency. The Court's reluctance to decide that issue without allowing the agency to exercise its statutory mandate first does not begin to support an exhaustion requirement in this case. Here, there is no dispute about the applicability of constitutional principles to the federal prisons, and the administrative procedure at issue neither develops a formal factual record nor considers any legal issue whatever.[14]

Finally, respondents rely on *Bush v. Lucas*, 462 U.S. 367 (1983), *see* Resp. Br. at 28-29, 36, where the Court refused to authorize *Bivens* actions by federal employees claiming that their superiors had violated their First Amendment rights. This holding was based on the fact that Congress, having balanced the competing considerations, had created a comprehensive administrative scheme covering this problem, which provided substantial relief. 462 U.S. at 368. Respondents attempt to show that here Congress has enunciated a policy favoring exhaustion of the BOP grievance procedure that should also be respected by this Court in crafting the *Bivens* remedy.

This analogy to *Bush* is far-fetched, to say the least. There, Congress had occupied the field by enacting a set

[14] Respondents argue that, while the BOP does not apply legal standards in the grievance process, that process serves to develop a useful factual record. Br. at 21-23. As we note *infra*, however, *all* that the grievance process actually produces is a cursory response to inmate complaints, based on whatever *ex parte* investigation administrators choose to undertake. Moreover, the cases cited by respondents for the proposition that courts should defer to the expertise of prison administrators, Br. at 17-18, all involved determinations about the substantive scope of prisoners' constitutional rights, and thus in no way support the procedural argument that prisoners' complaints should always be presented to the BOP before any court action commences.

of comprehensive administrative remedies. Here, by contrast, Congress has played only a limited role in devising the remedies and procedures that are available when federal prisoners suffer constitutional deprivations.[15] Moreover, it has never mandated or specifically authorized the creation of the BOP grievance procedure[16]—let alone indicated a view that it should be pursued prior to *Bivens* filings.

Respondents nevertheless ask the Court to infer an applicable congressional policy from the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, which, under specified circumstances, requires exhaustion of state administrative remedies before state prisoners may file actions under 42 U.S.C. § 1983. There are two problems with this argument. First, CRIPA constitutes a specific exception to the more general congressional policy, reflected in section 1983, favoring immediate access to federal courts for those claiming that governmental officials have violated constitutional requirements. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982). In those areas not covered by this specific exception, the existence of CRIPA thus argues *against* judicial creation of new exhaustion requirements for those seeking to vindicate their constitutional rights. *Cf. id.* at 512.

In any event, it is clear that CRIPA itself would not require exhaustion in this kind of case if the BOP grievance procedure were adopted by a state. As noted in our main brief, Pet. Br. at 13, the Attorney General—implementing the statutory requirement that states provide a

[15] To be sure, Congress has enacted the FTCA, which covers some such cases. However, as noted above, in the 1988 amendments to the FTCA Congress expressly left *Bivens* claims untouched, even as it preempted common-law claims against individual federal employees.

[16] The sole statutory authority cited by the BOP in creating the procedure is a collection of general statutes delegating authority to operate the federal prison system. *See* 28 C.F.R. Part 542 (citing 18 U.S.C. §§ 4001, 4042, 4081-82, 5015, 5039 and 28 U.S.C. § 509).

"plain, speedy, and effective system for the resolution of grievances," 42 U.S.C. § 1997e(b)(1)—requires that state procedures "afford a successful grievant a meaningful remedy." 28 C.F.R. § 40.6.[17] Respondents now argue that this standard can be met by a state procedure that offer no form of monetary remedy. Resp. Br. at 25-26. This may be true, but it is not true that such an approved procedure would have to be exhausted under CRIPA in a pure damages case.

To the contrary, under CRIPA, if an approved state plan did not offer compensation and a state prisoner filed an action under section 1983 seeking only damages, the proper response would be for the court to decline to require exhaustion.[18] This was made clear during the development of the CRIPA regulations. During that process, one comment on the proposed regulations suggested that, in addition to requiring a "meaningful remedy," they should specifically "require the availability of monetary relief through the grievance procedure." 46 Fed. Reg. 3843, 3844 (1981). The Justice Department rejected this suggestion, reasoning that this might require new state legislation and that a grievance procedure may be generally "fair and effective" even without such a remedy. *Id.* at 3845. In so doing, however, it noted that courts had a choice about requiring exhaustion under CRIPA in particular cases, adding that "[p]resumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, *exhaustion would not be appropriate.*" *Id.* (emphasis added).[19]

[17] *See also* Pet. Br. at 13 n.13 (citing regulations requiring state procedures to provide an advisory role for inmates and safeguards against reprisals).

[18] The statute makes such a decision discretionary with the court. *See* 42 U.S.C. § 1997e(a)(1) (court should continue case for up to 90 days to allow exhaustion "if the court believes that such a requirement would be appropriate and in the interests of justice").

In sum, no authority cited by respondents comes close to supporting their argument that federal prisoners seeking compensation for constitutional violations should be forced to pass through a grievance process where they cannot obtain that compensation. Indeed, respondents' failed effort to conjure up some legal basis for their position only serves to demonstrate the universality of the principle that exhaustion of administrative remedies is not required where those remedies are plainly inadequate.

2. The policy arguments presented by respondents also provide no valid basis for ignoring that basic principle in this case. When these policy arguments are fully examined, it remains clear that it would serve no legitimate purpose to require inmates to pursue three inevitably futile levels of the grievance process in every case where their only goal is to seek damages under *Bivens*. This useless requirement, moreover, would impose substantial, unjustifiable burdens and risks on the assertion of constitutional claims.

Leaving aside policy arguments based on the false assumption that an exhaustion rule would resolve many damages claims before they get to court, respondents make two additional claims. First, they argue that an exhaustion requirement would force inmates to come to administrators first with their complaints, thus promoting an expeditious response by the persons responsible

[19] For these reasons, it is neither surprising nor relevant that the Justice Department has not rejected certification of state grievance procedures that fail to offer a monetary remedy. *See* Resp. Br. at 26. The approval of such a plan would not require exhaustion by state prisoners with claims like that of petitioner. The decision cited by respondents that holds otherwise, *see* Resp. Br. at 25 (citing *Martin v. Catalanotto*, 895 F.2d 1040, 1042 (5th Cir. 1990)), fails to take note of the views expressed by the Attorney General in promulgating the CRIPA regulations.

for managing the prison. Br. at 18. But, while it is obviously desirable to fix ongoing problems quickly, this goal does not justify use of a mandatory exhaustion requirement as a form of leverage to force all inmate complaints into the grievance process whenever there is a possibility that they may later form the basis of a *Bivens* suit.

The grievance procedure, by its terms, must be invoked almost instantly after an allegedly improper incident has occurred. If, in the immediate aftermath of an incident, an inmate believes that there is some form of prospective relief that could alleviate an ongoing problem or prevent a recurrence, his only real option will be to file a grievance, and he will likely do so.[20] In many cases, however, an inmate will have no reason to seek such relief. This will be true, for example, where a complaint involves a unique event—such as injuries incurred in an outbreak of prison violence or a medical problem that is unlikely to arise again.[21]

In such a case, the inmate has a right to pursue his only available remedy—damages—in a *Bivens* action filed at any time within the applicable statute of limitations.

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[20] An immediate court action seeking equitable relief would not be an alternative because exhaustion probably is a legitimate requirement in injunctive cases. *See* Pet. Br. at 20 n.20 (citing cases). Certainly, there can be no argument that the BOP grievance procedure is underutilized so that administrators lack knowledge about ongoing prison problems. *See Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 34 (1977) (testimony of Assistant Attorney General Drew Days) ("I am informed that the Bureau of Prisons has a procedure that is used very much by prisoners.").

[21] In other cases, an inmate may know that he will soon be released. Respondents, however, would require such an inmate not only to initiate the grievance procedure but to complete it after he leaves federal custody before filing suit. Resp. Br. at 38 n.18.

Respondents' proposed rule, however, would lead to forfeiture of that right in any case where a *pro se* inmate did not immediately decide to pursue a constitutional claim and take the action required to preserve that claim —a grievance filing. In so doing, the rule would change the real limitations period for *Bivens* claims from a minimum of one year, *see* Resp. Br. at 29 n.13, to a matter of a few days. Moreover, the rule would require the inmate to pass through three levels of a grievance process that would not, under any theory, serve the stated goal of expeditious problem-solving in a case where there is no ongoing problem to correct.[22]

Respondents' final policy argument is that pursuit of the grievance process in a pure damages case develops a factual record, which, in turn, can (1) improve the clarity of the inmate's complaint, (2) help the court determine whether a complaint may have merit, (3) lessen the need for discovery, and (4) identify uncontested facts that may form the basis of a summary judgment. Resp. Br. at 20-23. None of this makes much sense.

To begin with, it is important to understand that all that the grievance process typically produces is a series of one-page responses to an inmate complaint, based on whatever independent investigation administrators choose to undertake. There is no discovery, no hearing, and no more formal determination of the facts. Moreover, as respondents concede, Br. at 22, any facts recited by the administrators are not binding on plaintiffs. Thus, in deciding motions to dismiss, limit discovery, or grant summary judgment, a court has no basis for assuming the validity of those facts.

Instead, if facts are required to address the merits, the court is required to wait until defendants have submitted

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[22] See *Appleby-El v. Henman*, 1991 U.S. Dist. Lexis 10830 (D. Kan. July 30, 1991) (Tenth Circuit's exhaustion rule requires not only filing of grievance but completion of all administrative appeals).

their version of the facts through affidavits, sworn discovery responses, or testimony. These usual processes, in turn, can proceed just as well regardless of whether the BOP has commented on the case in a grievance process. Individual defendants in *Bivens* cases know the relevant facts and are fully capable of presenting them.

Finally, respondents may be correct that in some cases the grievance record will assist *pro se* plaintiffs by helping them draft their complaints or alerting courts to a potentially meritorious claim. But requiring exhaustion certainly cannot be justified on this basis. This speculative benefit is far outweighed by the risks inherent in a rule that would require those same unrepresented individuals to determine, within a matter of days, that they have a valid constitutional claim and take the steps necessary to avoid forfeiture of that claim.[23]

CONCLUSION

The decision below should be reversed.

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[23] Respondents argue that the short time deadlines in the BOP procedure benefit inmates and can, in any event, be easily met. Br. at 30 n.14. The fact remains, however, that inmates could only avoid forfeiture of their claims if they undertook the requisite informal efforts to resolve the problem almost immediately and filed a grievance within 15 days. In no other context that we are aware of has the vindication of constitutional rights been conditioned on meeting such extraordinary deadlines.